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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE GRAZIANO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EDWARD T. M. GARLAND
STEVEN H. SADOW
DONALD F. SAMUEL
GARLAND, NUCKOLLS & CATTS, P.C.
92 Luckie St., N.W.
Atlanta, Ga. 30303
404/577-2325

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the statutory requirement of the Continuing Criminal Enterprise statute (21 U.S.C. § 848) that a defendant obtain substantial income or resources through the commission of three predicate drug offenses is satisfied by proof only that the defendant possessed drugs but obtained no money or resources.

PARTIES TO PROCEEDINGS BELOW

In addition to the petitioner, Bruce Graziano, Sam Ward was a defendant in the trial of this case.

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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Bruce Graziano, respectfully asks that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

On July 25, 1983, the United States Court of Appeals for the Eleventh Circuit issued its decision in *United States v. Bruce Graziano*, 710 F.2d 691 (11th Cir. 1983) (see appendix) affirming the conviction of petitioner on charges of violating 21 U.S.C. § 848, while vacating his conspiracy conviction. The trial was held in the Brunswick Division of the Southern District of Georgia.

A petition for rehearing en banc and for panel rehearing was filed on August 29, 1983. It was denied without opinion, and the mandate was issued on November 21, 1983.

JURISDICTION

Jurisdiction for this appeal lies under Title 28 U.S.C. § 1254(1) in that the petition seeks review of a case in the Court of Appeals.

STATUTORY PROVISIONS

28 U.S.C. § 848(b) provides:

> (b) [A] person is engaged in a continuing criminal enterprise if –
>
> (1) He violates any provision of this subchapter or subchapter II of this chapter, the punishment for which is a felony, and
>
> (2) Said violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter – (A) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

(i) Proceedings Below

Petitioner was convicted on May 17, 1981, of eleven counts relating to a drug smuggling operation. He was sentenced to thirty years and $100,000 fine on count one, the continuing criminal enterprise (21 U.S.C. § 848) offense. The remaining sentences, totaling 86 years, were to run concurrent with the thirty-year term.

The Court of Appeals for the Eleventh Circuit affirmed the conviction, except as to Count XI, which charged a conspiracy to possess with intent to distribute marijuana.

In connection with the continuing criminal enterprise offense, the Court of Appeals acknowledged that there was no evidence that the defendant obtained any income or resources apart from the drugs themselves through his drug offenses. The Court held, however, that the drugs were sufficient to satisfy the "substantial income or resources" requirement of 21 U.S.C. § 848.

(ii) Statement of the Facts

For purposes of this appeal, there are no disputed facts. The facts as set out in the Eleventh Circuit decision are sufficient:

"The government's evidence showed that Graziano occupied a supervisory position in three separate incidents. First, the evidence indicated that Graziano directed the attempted importation of approximately 40,000 pounds of marijuana and that this attempted offload was thwarted by the Coast Guard's capture of the mother ship. Second, the evidence detailed Graziano's participation in an attempt to import 60,000 to 80,000 pounds of marijuana. This offloading operation never took place. Third, the evidence outlined the arrangements which Graziano had made for transporting marijuana from a stashhouse in South Carolina to New York City. As it turned out, Graziano had engaged undercover agents to drive the delivery truck. Four thousand eight hundred pounds of marijuana were loaded into the truck, but since the undercover agents drove the delivery truck, this operation also ended in failure."

REASONS FOR GRANTING THE WRIT

Introduction

The decision of the Eleventh Circuit has eliminated one of the four basic elements of the continuing criminal enterprise offense: The requirement that the defendant obtain "substantial income or resources" from his violation of a drug offense. The Congressional intent is clearly expressed in the history of the legislation: The defendant must obtain some resource *other* than the contraband itself to satisfy this element of the offense. No other Court of Appeals has ventured to expand the coverage of 21 U.S.C. § 848 as has the Eleventh Circuit in this case.

Neither the caselaw, the legislative history, nor fundamental principles of statutory construction support the decision of the Court of Appeals. If the decision here is not reviewed, the government will never have to prove the obtention of substantial income or resources in any continuing criminal enterprise case as long as it has proven three violations of the federal drug laws. Thus, 21 U.S.C. § 848(b)(1)(B) becomes a nullity, a redundant and superfluous section of the Act.

ARGUMENT

THE STATUTORY REQUIREMENT OF THE CONTINUING CRIMINAL ENTERPRISE STATUTE (21 U.S.C. § 848) THAT A DEFENDANT OBTAIN SUBSTANTIAL INCOME OR RESOURCES THROUGH THE COMMISSION OF THREE PREDICATE DRUG OFFENSES IS NOT SATISFIED BY PROOF ONLY THAT THE DEFENDANT POSSESSED DRUGS BUT OBTAINED NO MONEY OR RESOURCES.

The offense of engaging in a continuing criminal enterprise is defined at 21 U.S.C. § 848:

> (b) [A] person is engaged in a continuing criminal enterprise if—
>
> (1) He violates any provision of this subchapter or subchapter II of this chapter, the punishment for which is a felony, and
>
> (2) Said violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—(A) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) *from which such person obtains substantial income or resources.*

There are four basic elements of this offense, each of which the government must prove beyond a reasonable doubt: (1) a violation of a specified drug law (2) the violation is one of a series (three or more violations) of such offenses; (3) the defendant occupies a management status among five or more members of the enterprise, and (4) the defendant obtains substantial income or resources from his drug offenses.

The focus of this appeal is the fourth ingredient of the offense: the obtention of substantial income or resources. The Court of Appeals acknowledged that the evidence—circumstantial or direct—did not justify the jury in concluding that the petitioner obtained *any* money, to say nothing of "substantial income," from the drug offenses set out in the indictment.

The court concluded, however, that the drugs themselves satisfied the "substantial income or resources" requirement of § 848 in that the 4,800 pounds of marijuana which petitioner had constructively possessed constituted

"substantial resources" which the appellant obtained from his drug law violations. This conclusion is unsupported by the legislative history, the caselaw, or fundamental principles of statutory construction.

A. **Legislative History**

The Court of Appeals ostensibly endeavored to plumb the legislative history for a definition of "resources." 710 F.2d at 698 n. 12. finding none, it resorted to Webster's New Collegiate Directory and decided that marijuana is "a natural source of wealth or revenue." *Id.* at 698. The legislative history, however, is not as barren as the Court of Appeals suggests.

The House Report, at two separate places in the introductory pages, refers to the substantial income requirement and *omits* the term "resources." H.R. Rep. No. 1444, 91st Cong. 2d Sess. *reprinted in* 1970 U.S. Code Cong. & Ad. News 4566, 4570 & 4575 (1969). The first reference (p. 4570) merely states that the defendant must obtain "substantial income." The second reference explains that:

> The reported bill provides severe criminal penalties for persons engaged in illicit manufacture or sale of controlled drugs *primarily for the profits to be derived therefrom*. Section 408 of the bill provides that persons engaged in continuing criminal enterprises involving violations of the bill *from which substantial profits are derived*, shall, upon conviction, be sentenced.

Clearly, the House Committee was concerned with drug dealers who derived an economic benefit from their endeavors. Since the term "resources" was already in the reported bill, H.R. 18583, the House Committee's shorthand reference to the requirement suggests that "re-

sources" was considered to be somewhat redundant, and certainly not a separate or alternative requirement.

The Senate Report of S. 3246, a companion bill traveling through the Senate simultaneously with H.R. 18583 sheds even more light on the nature of the "substantial income or resources" requirement. Senate Bill 3246, reported at S.Rep. No. 613, 91st Cong., 1st Sess. (1969), contained a provision akin to the "substantial income or resources" requirement found in H.R. 18583:

> Sec. 509(f): A defendant shall be deemed involved in a continuing criminal enterprise for purposes of this section if the court determines, by a preponderance of the evidence, that the convicted person—(1) played a substantial role in a continuing criminal enterprise involving any violation of this Act punishable by imprisonment for more than one year in concert with at least five other persons and occupied a position of organizer, a supervisory position, or other position of management, or
> (2) played a substantial role in a continuing criminal enterprise involving any violation of this Act punishable by imprisonment for more than one year and has or has had in his own name or under his control substantial income or resources not demonstrated to have been derived from lawful activities or interests.

S. 3246 was ultimately abandoned, and H.R. 18583 enacted following minor amendments by the Conference Committee. Conf. Rep. No. 91-1503, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4566, 4659. The Senate bill clearly envisions resources which are derived with funds or as barter in connection with drug trade. The burden was placed on the convicted drug defendant to prove that his resources were obtained with legitimate funds. If the resources could include the drugs themselves, it would be impossible for a defendant to sustain this burden. The

Senate contemplated drug offenders with yachts and seaside villas. If they could not explain how they were obtained, the defendant would be sentenced pursuant to the continuing criminal enterprise provisions.

H.R. 18583 initially had the same burden of proof. However, it was amended by the Dingell Amendment, which adopted the language ultimately enacted into law. The Dingell Amendment was proposed because of the concern of the House Committee with the burden of proof falling on the defendant. It was *not* offered to broaden the definition of "resources." 1970 U.S. Code Cong. & Ad. News 4566, 4650-51. Thus, the House envisioned the same type of resources—yachts and houses and other ill-gotten gains—as the Senate; the House changed the language only for the purpose of shifting the the burden of proof back to the government. Finally, the "Additional Views" offered by Congressmen John E. Moss, John D. Dingell, Brock Adams and Bob Eckhardt in the House Report disclose that the drugs themselves were not contemplated as the "resources." 1970 U.S. Code Cong. & Ad. News 4566, 4651. They posed a hypothetical situation:

> Suppose . . . that six young men attending college reside together in a cooperative boarding house. All of them have engaged in the practice of smoking marijuana cigarettes and there has been, on a day or more, free exchange between them of such forbidden drug. Each incident of giving a cigarette to another constitutes a felony.

They then queried whether the "substantial income or resources" requirement would be satisfied if,

> [the house manager] [o]n one occasion . . . purchases $100 worth of marijuana and divides it with the other five members, selling it to them at cost. Has he then

> obtained "substantial income or resources" in connection with the enterprise?
>
> Or what if such common purchase by one of the group is done each week? Also, does "substantial income or resources" relate to profits or, on the other hand, to mere receipt of money? Would "income or resources" include the advantage to the house manager of obtaining his own share of the marijuana at a cheaper rate because it was bought in bulk?

Id. at 4651-52. If, as the panel concluded here, the marijuana itself could be a "substantial resource" their ponderings would be rendered meaningless, for the house manager would have obtained "substantial resources" simply because he possessed the marijuana.

Congress never envisioned that "resources" would include the proscribed drugs. Both the Senate and the House committees made their views to the contrary clear. The panel's cursory review of the legislative history—searching in vain for a definition—overlooked the revealing footprints of the bills as they marched through Congress. Webster's New Collegiate Dictionary may sometimes be a persuasive source. But not in this situation. Congressional intent must be gleaned from the legislative history, not from the dictionary.

B. **Caselaw**

Many courts have wrestled with the "substantial income or resources" requirement. In every case, the defendant had at least constructive possession of drugs; never has a court held that the possession of drugs alone satisfied the substantial income or resources requirement. The panel opinion, for the first time, has deemed drugs to be a "resource" under § 848.

In *United States v. Losada*, 674 F.2d 167 (2d Cir. 1982), although there was an abundance of evidence that the defendant possessed substantial quantities of cocaine, the court focused on the question of whether $2,000—the only income shown to have been derived from drug sales—was substantial. It was never suggested that the cocaine itself would constitute a resource.

Other cases recognize that it was substantial financial benefit that concerned Congress. *See, e.g., United States v. Jeffers*, 532 F.2d 1101, 116 (7th Cir. 1976) ("Clearly, when Congress passed the statute it intended that the continuing criminal enterprise section reach those persons who were reaping large profits from illegal drug traffic") *rev'd in part on other grounds sub nom. Jeffers v. United States*, 432 U.S. 137 (1977); *United States v. Manfredi*, 488 F.2d 588, 603 (2d Cir. 1973) (The statute was aimed at those who were engaged in "the continuous sale and trafficking in heroin with a number of other people and with substantial sums of money changing hands"); *United States v. Sisca*, 503 F.2d 1337, 1346 (2d Cir. 1974) ("substantial economic benefit"); *United States v. Chagra*, 669 F.2d 241, 257 (5th Cir. 1982) ("handsome return"); *United States v. Webster*, 639 F.2d 174, 182 (4th Cir. 1981) (substantial income or resources requirement is a "financial limitation").

To be sure, many cases, including some of those cited above, have focused on the quantity of drugs—but *not* to support the finding of substantial resources. Rather, the cases detail the quantity of drugs to show that the jury could *infer* from this circumstantial evidence that substantial income *could have been* (or was) obtained. That is, the quantity of drugs is *circumstantial evidence* that the substantial income or resources requirements was met.

For example, in *United States v. Chagra*, the court concluded, "The jury is entitled to draw the eminently reasonable inference that a defendant running an expensive drug trafficking operation without another, legitimate and remunerative occupation is obtaining the funds to transact his business from his drug transactions." 669 F.2d at 258. Similarly, in *United States v. Sisca*, the court wrote,

> [I]n view of his position in the distribution network, the enormous quantity of narcotics involved (over 200 kilograms annually) and the substantial sums of money changing hands ($5,000,000 annually), the jury surely was justified in finding that Abraham derived substantial income from this immensely profitable narcotics enterprise.

503 F.2d at 1346. The court in *United States v. Webster* held "Given the quantity of drugs which were shown to have been moving in and out of Webster's possession, the jury would have been justified in concluding that he had received tens of thousands or even hundreds of thousands of dollars from his drug business." 639 F.2d at 182. *See also United States v. Gantt*, 617 F.2d 831, 847 (D.C. Cir. 1980); *United States v. Valenzuela*, 596 F.2d 1361, 1368 (9th Cir. 1979); *United States v. Phillips*, 664 F.2d 971, 1035 (5th Cir., Unit B, 1981).

In all of these cases, the courts either found direct evidence of substantial income or concluded that the quantities of drugs involved justified an inference that substantial income was obtained from the sales.

No such inference can be made in this case. The three drug transactions set out in the indictment did not result in *any* income or resources to the defendant. Each of the smuggling ventures was thwarted.

C. **Statutory Construction**

The Court of Appeals decision was premised, in part, on "one fundamental principle of statutory construction, 'words will be interpreted as taking their ordinary, contemporary, common meaning.' " 710 F.2d at 698. However, equally profound principles of statutory construction were overlooked by the court.

A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. *United States v. Dinerstein*, 362 F.2d 852 (2d Cir. 1966); *Zeigler Coal Co. v. Klepper*, 536 F.2d 398 (D.C. Cir. 1976); 2A SUTHERLAND STATUTORY CONSTRUCTION, § 46.06 (1973). The court's holding virtually negates the "substantial income or resources" requirement. All § 848 cases involve drug transactions by "Kingpins." *United States v. Phillips*, 664 F.2d at 1013 n. 62. In every case where the other elements of the offense are proven, there will necessarily be at least constructive possession of drugs. Consequently, a defendant will always derive "resources" as defined by the Court of Appeals and the element will become superfluous.

The Court of Appeals' error results from its violation of an even more fundamental principle of statutory construction: It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers and then reconstruct the instrument upon the basis of these definitions. *Addison v. Holly Hill Fruit Products, Inc.* 322 U.S. 607 (1944); *Philbrook v. Glodgett*, 421 U.S. 707 (1975).

The court's dictionary definition of the term "resources" gives content to one word at the expense of the integrity of § 848 as a whole.

D. The Trial Judge Did Not Instruct the Jury That Drugs Could Constitute "Substantial Resources."

Finally, it should be noted that the trial judge did not instruct the jury that drugs could constitute substantial resources. Whether the jurors had a copy of Webster's dictionary during their deliberations is not known. But because the jury was not instructed on this matter, their verdict cannot be upheld on the novel theory announced for the first time in the Court of Appeals. *Cf. United States v. Raffone*, 693 F.2d 1343, 1346 (11th Cir. 1982) (failure to give "*Pinkerton*" liability instructions precludes upholding verdict on this theory).

CONCLUSION

The Continuing Criminal Enterprise statute provides for the most Draconian penalties in the Federal Criminal Code. Sentences which cannot be probated or suspended and the unavailability of parole (21 U.S.C. § 848(C)) results in prison terms far in excess of those imposed in capital cases. To broaden by judicial fiat the category of offenders punishable under this section is unconscionable.

Congress has singled out those persons who have made substantial income or resources from three drug law violations. It is not the office of the courts to ignore this requirement or to render it superfluous by allowing proof of the drug law violations themselves to satisfy this independent requirement.

For the foregoing reasons, Petitioner respectfully urges the Court to issue a writ of certiorari to the Eleventh Circuit to review the decision of that Court affirming the conviction of Petitioner.

Respectfully submitted,

GARLAND, NUCKOLLS & CATTS, P.C.

EDWARD T. M. GARLAND
STEVEN H. SADOW
DONALD F. SAMUEL

92 Luckie St., N.W.
Atlanta, Ga. 30303
404/577-2225

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit upon Melissa Mundell, AUSA, U.S. Courthouse, Bull & State Streets, Savannah, Ga. 31412, by depositing same into the United States Mail with the correct amount of postage affixed thereto to ensure delivery.

This _____ day of January, 1984.

DONALD F. SAMUEL

APPENDIX

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bruce GRAZIANO, Sam Ward,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bruce GRAZIANO, Defendant-Appellant.
Nos. 81-7569, 81-7657.

United States Court of Appeals,
Eleventh Circuit.

July 25, 1983.
Rehearing and Rehearing En Banc
Denied Nov. 1, 1983.

Defendants were convicted before the United States District Court for the Southern District of Georgia, Anthony A. Alaimo, C.J., of drug offenses, and they appealed. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) since defendant's attorney did not have to comment on jointly tried codefendant's silence to avoid real prejudice to defendant denial of severance was not abuse of discretion; (2) there was no plain error in use of phrase "anticipated profits" in defining the "substantial income" element of offense of engaging

in a continuing criminal enterprise; (3) subject marijuana itself was a "resource" for purpose of the continuing criminal enterprise conviction; (4) the 4,800 pounds of marijuana was a "substantial" amount; and (5) offense of conspiracy to possess marijuana with intent to distribute was a lesser included offense of engaging in a continuing criminal enterprise.

Affirmed in part and vacated in part.

See also, 11th Cir., 682 F.2d 1384.

1. Criminal Law 622(1), 1148

District court has discretion to grant or deny a severance of defendants and its judgment will not be overturned absent abuse. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

2. Criminal Law 622(1)

Real prejudice requiring severance occurs only if the defenses offered by jointly tried defendants are antagonistic and mutually exclusive. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

3. Criminal Law 622(2)

Denial of defendant's severance motion was not abuse of discretion as counsel did not need to comment on jointly tried codefendant's silence to avoid real prejudice. Fed. Rules Cr.Proc.Rule 14, 18 U.S.C.A.

4. Drugs and Narcotics 73

A person is engaged in a "continuing criminal enterprise" only if he obtains substantial income or resource from a continuing series of violations of the Comprehensive Drug Prevention and Control Act. Comprehensive

Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law 1043(1)

Where defendant did not sufficiently object to use of phrase "anticipated profits" in proposed instruction on offense of engaging in a continuing criminal enterprise the instruction was reviewed under the plain error standard. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

6. Criminal Law 844(1)

It is defense counsel's duty to identify a jury instruction's erroneous language. Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

7. Criminal Law 1043(2)

Where in objecting to the "substantial income" element of instruction defining continuing criminal enterprise liability under Comprehensive Drug Prevention and Control Act counsel's concern was not directed at anticipated income but income obtained from prior conduct not connected with the charged offenses, appellate review was limited to whether the instruction was plain error, notwithstanding that counsel objected generally to the instruction on substantial income. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

8. Criminal Law 1043(2)

Although requested instructions did not use the word "anticipated," the instructions did not substitute for

specific objection that the phrase "anticipated income" in the court's instructions did not meet requirements of the "substantial income" aspect of continuing criminal enterprise liability under drug laws. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848; Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

9. Criminal Law 1043(3)

Plain error standard applies even where a defendant objects on one ground at trial and then argues on appeal that the objection should have been sustained on another ground.

10. Drugs and Narcotics 132

There was no plain error in inclusion of phrase "anticipated profits" in instruction on the "substantial income" element of offense of engaging in a continuing criminal enterprise in violation of Comprehensive Drug Abuse Prevention and Control Act. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

11. Criminal Law 1043(2)

Plain error rule must be carefully applied to avoid conflicting with rule barring one from assigning error to an instruction unless objection is distinctly stated. Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

12. Criminal Law 561(1)

Evidence is sufficient to sustain conviction if a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.

13. Criminal Law 1144.13(3)

To evaluate sufficiency of the evidence, the evidence is viewed in the light most favorable to the government.

14. Drugs and Narcotics 123

Evidence in prosecution for engaging in a continuing criminal enterprise in violation of Comprehensive Drug Abuse Prevention and Control Act supported conviction as reasonable jury could find that defendant obtained substantial resources from a continuing series of federal drug violations and that he occupied a supervisory position in three separate drug incidents. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

15. Drugs and Narcotics 123

Marijuana which was subject of importation and transportational schemes was itself a "resource" for purpose of engaging in a continuing criminal enterprise in violation of Comprehensive Drug Abuse Prevention and Control Act. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

See publication Words and Phrases for other judicial constructions and definitions.

16. Statutes 188

An interpretation according to plain meaning should give effect to Congress' intention.

17. Drugs and Narcotics 73

The 4,800 pounds of marijuana loaded into delivery truck was a "substantial" amount for purpose of conviction of engaging in the continuing criminal enterprise in

violation of Comprehensive Drug Abuse Prevention and Control Act. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

See publication Words and Phrases for other judicial constructions and definitions.

18. Criminal Law 29

Indictment and Information 191

Conspiracy to possess marijuana with intent to distribute was a lesser included offense of offense of engaging in a continuing criminal enterprise in violation of Comprehensive Drug Abuse Prevention and Control Act and proper remedy was to vacate conviction and sentence for the conspiracy offense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 408, 21 U.S.C.A. §§ 846, 848.

Garland, Nuckolls & Catts, Edward T. M. Garland, Steven H. Sadow, Atlanta, Ga., for Graziano.

Orion Douglass (Court-appointed), Brunswick, Ga., for Ward.

William H. McAbee, Melissa S. Mundell, II, Asst. U.S. Attys., Savannah, Ga., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Georgia.

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

Appellants Bruce Graziano and Sam Ward were convicted of several drug-related offenses.[1] After reviewing appellants' several claims of error, we vacate Graziano's conviction and sentence for the offense charged in Count XI under 21 U.S.C.A. § 846 (West 1981) (conspiracy to possess marijuana with intent to distribute). We affirm Graziano's other convictions and sentences, and we affirm Ward's convictions and sentences. Our analysis of appellants' principal contentions is detailed below.

I. SEVERANCE

[1] Ward argues that the district court erred in not granting his motion for severance under Fed.R.Crim.P. 14.[2] The district court has discretion to grant or deny a Rule 14 motion for severance of defendants, and the district court's judgment will not be overturned in the absence of an abuse of that discretion. *United States v. Butera*, 677 F.2d 1376, 1385 (11th Cir. 1982), *cert. denied*,

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[1] Graziano was found guilty of engaging in a continuing criminal enterprise (21 U.S.C.A. § 848 (West 1981)), attempting to import marijuana (21 U.S.C.A. § 963 (West 1981)), possessing marijuana with intent to distribute (21 U.S.C.A. § 841(a)(1) (West 1981)), using a communication facility to facilitate a felony (21 U.S.C.A. § 843(b) (West 1981)), attempting to possess marijuana with intent to distribute (21 U.S.C.A. § 846 (West 1981)), conspiring to possess marijuana with intent to distribute (21 U.S.C.A. § 846 (West 1981)), and aiding and abetting (18 U.S.C.A. § 2 (West 1969)). Sam Ward was found guilty of attempting to import marijuana (21 U.S.C.A. § 963 (West 1981)), possessing marijuana with intent to distribute (21 U.S.C.A. § 841(a)(1) (West 1981)), using a communication facility to facilitate a felony (21 U.S.C.A. § 843(b) (West 1981)), attempting to possess marijuana with intent to distribute (21 U.S.C.A. § 846 (West 1981)), and aiding and abetting (18 U.S.C.A. § 2 (West 1969)).

[2] Rule 14 states that "If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants in an indictment or information or by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires."

___ U.S. ___, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983); *United States v. Nickerson*, 669 F.2d 1016, 1022 (5th Cir. 1982) (Unit B); *United States v. Berkowitz*, 662 F.2d 1127, 1132 (5th Cir. 1981) (Unit B).[3] To prevail on a severance claim, "appellant must demonstrate that he received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection." *Id.* at 1132. We hold that Ward has not demonstrated such compelling prejudice. *See United States v. Butera, supra; United States v. Marszalkowski*, 669 F.2d 655, 660 (11th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 208, 74 L.Ed.2d 167 (1982).

Ward's specific argument concerning *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962), deserves further mention. Ward's co-defendant, Graziano, did not testify at the trial, and Ward's attorney sought to comment on Graziano's silence in closing argument. The district court ruled that the attorney could not comment on Graziano's failure to take the stand. Ward contends that such comment was necessary to contrast Ward's willingness to testify with any inferences of guilt that could be associated with Graziano's unwillingness to testify. Ward cites *DeLuna* wherein it was stated in dictum:

> If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.

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[3] In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. *Id.* at 34. *Cf. Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

DeLuna v. United States, 308 F.2d at 141.[4]

[2] As *DeLuna* has been construed, the defendant's attorney has a clear duty to comment on a co-defendant's silence only when those comments are necessary to avoid real prejudice to the defendant. *See United States v. Kopituk*, 690 F.2d 1289, 1319 (11th Cir.1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983). Real prejudice occurs only if the defenses offered by the defendant and the co-defendant are antagonistic and mutually exclusive. *United States v. Vadino*, 680 F.2d 1329, 1336 (11th Cir.1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1771, 76 L.Ed.2d 344 (1983); *United States v. Nakaladski*, 481 F.2d 289, 302 (5th Cir.1973), *cert. denied*, 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 469 (1973); *United States v. Hyde*, 448 F.2d 815, 832 (5th Cir.1971), *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972); *Gurleski v. United States*, 405 F.2d 253, 265 (5th Cir.1968), *cert. denied*, 395 U.S. 981, 89 S.Ct. 2140, 23 L.Ed.2d 769 (1969). *DeLuna* provides a good example of antagonistic defenses. Each defendant in *DeLuna* sought to cast total blame for the criminal offense on his co-defendant.[5]

[3] In the instant case, the defendants' defenses were not sufficiently antagonistic to require severance. Since Ward's attorney did not need to comment on Graziano's

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[4] In *DeLuna*, the attorney for Gomez, one defendant, commented on the silence of Deluna, the other defendant. The question was whether those prejudicial comments infringed upon DeLuna's Fifth Amendment privilege against self-incrimination. 308 F.2d at 141-43. In the instant case, on the other hand, the district court did not permit Ward's attorney to comment on Graziano's silence. Hence, the question does not center on the Fifth Amendment privilege, but rather on Ward's severance claim.

[5] While DeLuna's co-defendant testified, DeLuna's defense was relayed through his attorney. *See* 308 F.2d at 141-43.

silence to avoid real prejudice to Ward, Ward's attorney did not have a clear duty to comment on Graziano's silence. *DeLuna* is inapplicable, and we conclude that the district court did not abuse its discretion in denying Ward's motion for severance.

II. JURY INSTRUCTION ON SECTION 848

[4, 5] 21 U.S.C.A. § 848 defines the offense of engaging in a continuing criminal enterprise.[6] This offense includes the element of obtaining "substantial income." A person is engaged in a continuing criminal enterprise only if he "obtains substantial income or resources" from a continuing series of violations. Graziano argues that the district court's instruction on the "substantial income" element was erroneous. He contends that the instruction authorized the jury to find the element of the drug operations represented substantial *anticipated* profits to Graziano, while the statute requires a finding that Graziano actually obtained substantial income or resources. For the purpose of evaluating this contention, we assume, but expressly do not decide, that the statute requires the actual receipt of substantial income or resources, and that a defendant who merely engages in drug operations that represent substantial *anticipated* profits does not fall

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[6] 21 U.S.C.A. § 848 (West 1981) provides in relevant part:

B. [A] person is engaged in a continuing criminal enterprise if—
(1) He violates any provision of this subchapter or subchapter II of this chapter, the punishment for which is a felony, and
(2) Said violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
(A) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
(B) From which such person obtains substantial income or resources.

within the purview of the statute. After reviewing the record, we have concluded that Graziano did not sufficiently object to the use of the phrase "anticipated profits" in the district court's proposed jury instruction. As a result, we must evaluate the instruction given under the "plain error" standard. We conclude that there was no plain error.

Rule 30 of the Federal Rules of Criminal Procedure provides in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the manner to which he objects and the grounds of his objection.

Fed.R.Crim.P. 30. On this appeal, Graziano assigns as error this part of the district court's jury instruction:

> I charge you that the statutory requirement of receipt of substantial income or resources is satisfied if you find that many thousands of dollars changed hands, some of which was received directly by Defendant Graziano as a result of drug trafficking operations that represented substantial, anticipated profit.
>
> Now, the statutory requirement is also met if you find the drug trafficking operations represented substantial, anticipated profits to Defendant Graziano.

Record, vol. 9, at 136.

The following exchange occurred out of the jury's presence at the trial below. Graziano's attorney said that "the income must come from the enterprises alleged in the indictment, not some *prior* conduct." *Id.* at 96 (emphasis added). Graziano's attorney then requested "a limiting instruction to the jury to the effect that the jury would not be authorized to find the element of substantial income from any transactions other than the transactions

as alleged in the indictment." *Id.* at 96-97. At that point, the government attorney agreed with Graziano's attorney and the district judge added that "the continuing enterprise could take into consideration other actions on his part; the question of substantial income could not." *Id.*

Significantly, the district court acceded to Graziano's request for a limiting instruction. The court instructed the jury:

> I charge you that the burden is on the Government in this respect to prove beyond a reasonable doubt that the substantial income claimed to have been received by defendant Graziano came from the alleged violations described in the indictment. Mere expenditures by him are not enough unless coupled with proof that the money expended came from the continuing drug violations alleged in the indictment.

Id. at 136. This instruction came from defense counsel's own requests. *Compare* Record, vol. 2, at 556 (requested instruction) *with id.*, vol. 9, at 136 (actual instruction). *See also id.* at 129 (charging jury that it must find that Graziano obtained substantial income from the continuing series of violations which included those in the indictment).

[6, 7] Applying Rule 30's requirements, we hold that defense counsel's statements do not state distinctly an objection to the instruction's use of the term "anticipated." Nowhere did defense counsel specifically ground his objection to the "substantial income" instruction in the use of the word "anticipated." It is defense counsel's duty to identify a jury instruction's erroneous language. *United States v. Spiegel*, 604 F.2d 961, 970 (5th Cir.1979), *cert. denied*, 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787

(1980). If Graziano's attorney sought to delete reference to the term "anticipated," this was not made clear from any of his statements.[7] Indeed, his statements indicate that his concern was not directed at anticipated income. Instead, Graziano's attorney evidenced concern about the jury considering income obtained from prior conduct not connected with the offenses charged in the indictment. Record, vol. 9, at 96.

[8, 9] Since Graziano's attorney did not adequately object to the use of the word "anticipated" in the jury instruction,[8] our inquiry on appeal concerns the question whether the instruction constitutes plain error. *See United States v. Spiegel*, 604 F.2d at 970. Graziano's attorney, to be sure, did object generally to the instruction on substantial income. However, his objection, as we have indicated, centered on the fear that the jury would find Graziano guilty based on his receipt of substantial income from prior conduct. The plain error standard applies even where the defendant objects on one ground at trial and then argues on appeal that the objection should have been

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[7] Graziano's attorney also said that he believed that "the court is inadequately charging on the subject matter of the substantial income from the enterprise." *Id.* at 99. Graziano's attorney sought to have the court consider his requested instructions which he had written by hand immediately before submitting them. Finally, Graziano's attorney said that he wanted the court "to know that we object to the charges given on page 38(e) and (f) as being insufficient . . . as a matter of law." *Id.* at 101; *see also, id.* at 148-50.

[8] Immediately before the district court was ready to charge the jury, Graziano's attorney sought to submit his requested instructions on § 848. These instructions did not use the word "anticipated." It is too much to ask of the district court that it would be able to discern from these requested instructions that defense counsel objected to the use of the word "anticipated." Under Rule 30, moreover, requested instructions do not substitute for specific objections to the court's instructions. *See United States v. Byrd*, 542 F.2d 1026, 1028 (8th Cir. 1976).

sustained on other grounds. *See United States v. Pool*, 660 F.2d 547, 559 n. 4 (5th Cir.1981) (Unit B); *United States v. Fox*, 613 F.2d 99, 101 (5th Cir.1980).

[10, 11] Under the plain error standard, the defendant must demonstrate that " 'the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice,' " or that the charge " 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.' " *United States v. Thevis*, 665 F.2d 616, 645 (5th Cir.1982) (Unit B), *cert. denied*, 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303, ___ U.S. ___, 102 S.Ct. 3489, 73 L.Ed.2d 1370, & ___ U.S. ___, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982) (quoting from *United States v. Varkonyi*, 645 F.2d 453, 460 (5th Cir.1981) (Unit A), and *United States v. Adams*, 634 F.2d 830, 836 (5th Cir.1981)). The jury charge, even though it included the term "anticipated," was not plain error.[9] A fair interpretation of the entire charge suggests that the jury was directed to find the substantial income element only if Graziano obtained substantial income from "the alleged violations described in the indictment." Record, vol. 9, at 136. Significantly, that phrase came from the requested instructions submitted by Graziano's attorney. This suggests to us that, had Graziano's attorney specified that the use of the word "anticipated" was objectionable, the district court would have corrected any lingering ambiguity. *See United States v. Thevis*, 665 F.2d at 645. There was no plain error here.

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[9] We note that the plain error rule must be carefully applied to avoid conflicting with the requirements of Rule 30. *See United States v. Gerald*, 624 F.2d 1291, 1300 (5th Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981).

III. SUFFICIENCY OF THE EVIDENCE

[**12-14**] Graziano contends that the evidence is insufficient to support his conviction under 21 U.S.C.A. § 848 [10] because the evidence did not prove that he obtained substantial income or resources from engaging in a continuing criminal enterprise. Evidence is sufficient to sustain a criminal conviction if a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc). To evaluate the sufficiency of the evidence, the evidence is viewed in a light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). Applying these standards, we hold that the evidence was sufficient to allow a reasonable jury to find that Graziano obtained substantial resources from a continuing series of federal drug violations.

The government's evidence showed that Graziano occupied a supervisory position in three separate incidents.[11] First, the evidence indicated that Graziano directed the attempted importation of approximately 40,000 pounds of marijuana and that this attempted offload was thwarted by the Coast Guard's capture of the mother ship. Second, the evidence detailed Graziano's participation in an attempt to import 60,000 to 80,000 pounds of marijuana. This offload operation never took place. Third, the evidence outlined the arrangements which Graziano had made for transporting marijuana from a stashhouse in South Carolina to New York City. As it turned out, Gra-

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[10] *See* note 6 *supra*.

[11] Three violations of the relevant subchapters in Title 21 constitute a "continuing series of violations" under § 848. *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981) (Unit B), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

ziano had engaged undercover agents to drive the delivery truck. Four thousand eight hundred pounds of marijuana were loaded into the truck, but since the undercover agents drove the delivery truck, this operation also ended in failure.

[15] Graziano argues that the government failed to adduce any evidence that he received substantial income or resources from these operations. While his argument is appealing at first glance, it ultimately suffers from an excessively narrow reading of § 848's requirements. Graziano's claim that he never received income from the three drug violations overlooks the plain language of § 848. By its very terms, § 848 illustrates Congress' intent to punish those persons who receive substantial "resources." Although the statute does not explicitly define the term "resources", basic principles of statutory construction suggest that marijuana itself is a resource, for purposes of applying § 848.

Under one fundamental principle of statutory construction, "words will be interpreted as taking their ordinary, contemporary, common meaning," unless otherwise defined. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1980); *United States v. Scrimgeour*, 636 F.2d 1019, 1022 (5th Cir.1981) (Unit B), *cert. denied*, 454 U.S. 878, 102 S.Ct. 359, 70 L.Ed.2d 188 (1981). The common contemporary meaning of resources is "a natural source of wealth or revenue." Webster's New Collegiate Dictionary 978 (1979). In the context of a criminal statute dealing with drug violations, marijuana fits this definition.

[16] Of course, an interpretation according to plain meaning should give effect to Congress' intention. *United States v. Apfelbaum*, 445 U.S. 115, 121, 100 S.Ct. 948, 952,

63 L.Ed.2d 250 (1980). In enacting § 848 and its companion provisions, Congress made its general purpose quite clear: to strengthen control and law enforcement over importation, manufacture, distribution, and possession of controlled substances. *See* 21 U.S.C.A. § 801(2) (West 1981). Section 848 in particular was "intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation." H.R.Rep. No. 1444, 91st Cong.2d Sess. 10, *reprinted in* 1970 U.S. Code Cong. & Ad.News 4566, 4576. Section 848 effectuated Congress' intent to punish severly professional criminals engaged in continuing criminal drug violations. *See Jeffers v. United States*, 432 U.S. 137, 148 n. 14, 97 S.Ct. 2207, 2215 n. 14, 53 L.Ed.2d 168 (1977) (summarizing House floor debates).[12] This evidence of Congress's general purpose supports our interpretation of marijuana as a § 848 resource.

[17] With our understanding that "resources" can mean marijuana itself, we have no difficulty in finding that Graziano obtained substantial resources. In particular, the third operation provides sufficient evidence that Graziano obtained substantial resources. As we have already indicated, the marijuana itself was a resource.

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[12] We note that, while the statute's plain language and Congress' general purpose support our construction of the word "resources," the legislative history is silent on its meaning. The term "resources," when mentioned, is left undefined. H.R.Rep. No. 1444, 91st Cong.2d Sess. 32 & 50, *reprinted in* 1970 U.S.Code Cong. & Ad.News 4566, 4599 & 4618; S.Rep. No. 613, 91st Cong., 1st Sess. 28 & 121 (1969). Four members of the House Interstate and Foreign Commerce Committee submitted additional views, in which they stated that "[i]t is not at all clear what is meant by deriving substantial income or resources from the enterprise." H.R.Rep. No. 1444, 91st Cong., 2d Sess., 84-85, *reprinted in* 1970 U.S.Code Cong. & Ad.News 4566, 4651-52.

Graziano "obtained" that marijuana; evidence showed Graziano's constructive possession of it. *See United States v. Davis*, 679 F.2d 845, 854 (11th Cir.1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1198, 75 L.Ed.2d 441 (1983). The 4,800 pounds of marijuana qualifies as a "substantial" amount. *United States v. Phillips*, 664 F.2d 971, 1035 (5th Cir.1981) (Unit B) (defendant received substantial income from 3,800 pounds of marijuana); *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.1982), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982).

Overall, the evidence revealed Graziano's key management role in the several attempted drug operations.[13] That evidence, combined with the specific acquisition of the 4,800 pounds of marijuana, is sufficient to justify conviction under § 848. *United States v. Chagra*, 669 F.2d 241, 257 (5th Cir.1981) (Unit A); *United States v. Phillips*, 664 F.2d at 1035.

IV. SENTENCING

[18] Graziano asks this court to vacate the conviction and sentence he received for Count XI, the § 846 offense of conspiracy to possess marijuana with intent to distribute. This § 846 offense of conspiracy is a lesser-included offense of the § 848 offense of engaging in a continuing criminal enterprise. *See Jeffers v. United States*, 432 U.S. 137, 149-50, 97 S.Ct. 2207, 2215-16, 53 L.Ed.2d 168 (1977); *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.1979), *cert. denied*, 444 U.S. 825, 100 S.Ct. 47, 62

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[13] For example, Graziano paid out front money to agents totaling $19,990. When one agent pressed him for more front money, Graziano explained that he had lost money in the unsuccessful first attempted importation. Graziano concedes that the evidence could be interpreted to show that he had a proprietary interest in this first load of marijuana. Appellant's Brief at 24.

L.Ed.2d 32 (1979). In such circumstances, the proper remedy is to vacate both the conviction and sentence of the § 848 conspiracy offense. *See United States v. Michel*, 588 F.2d at 1001. We therefore vacate Graziano's conviction and sentence for conspiracy to possess with intent to distribute marijuana (Count XI).

V. CONCLUSION

We have examined the other contentions advanced by appellants Ward and Graziano. We reject these contentions.

Accordingly, appellant Ward's convictions and sentences are AFFIRMED.

Appellant Graziano's conviction and sentence for Count XI, the § 846 offense of conspiracy to possess marijuana with intent to distribute, are VACATED. Appellant Graziano's other convictions and sentences are AFFIRMED.

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No. 83-1191

In the Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE GRAZIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether there was sufficient evidence to show that petitioner obtained "substantial income or resources" from engaging in a continuing criminal enterprise within the meaning of 21 U.S.C. 848.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 710 F.2d 691.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1983. A petition for rehearing was denied on November 1, 1983. The petition for a writ of certiorari was filed on January 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted on one count of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848; two counts of attempting to import marijuana, in violation of 21 U.S.C. 963; two counts of possessing marijuana with intent to

distribute it, in violation of 21 U.S.C. 841(a)(1); four counts of using a communication facility to facilitate a felony, in violation of 21 U.S.C. 843(b); one count of attempting to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; and one count of conspiring to possess marijuana with intent to distribute it (Pet. App. 7a n.1).

Petitioner was sentenced to the following terms of imprisonment: 30 years on the continuing criminal enterprise count, five years on each attempted importation count, 15 years on each possession with intent to distribute count, four years on each use of a communication facility count, 15 years on the attempt count and 15 years on the conspiracy count. The sentences on the attempt and one of the possession with intent to distribute counts were ordered to run consecutively to each other and, as were all the remaining counts, concurrently with the continuing criminal enterprise count. Petitioner was also ordered to serve two concurrent five-year special parole terms on the possession with intent to distribute counts and fined a total of $530,000.[1]

1. The evidence at trial showed that petitioner participated as a supervisor in two separate attempts to import marijuana and, in addition, arranged for the transportation

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[1]On appeal, after affirming the conviction for operating a continuing criminal enterprise, the court of appeals vacated the conviction and sentence (15 years and $15,000) on the lesser-included conspiracy count (Pet. App. 18a-19a).

Sam Ward, petitioner's co-defendant, was convicted on two counts of attempting to import marijuana, in violation of 21 U.S.C. 963. He was also convicted on one count each of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), using a communications facility to facilitate a felony, in violation of 21 U.S.C. 843, and attempting to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of imprisonment, the longest of which was 15 years; he was also ordered to serve a five-year special parole term on the possession count and fined $125,000.

of marijuana by truck from South Carolina to New York (Pet. App. 15a). The first importation involved an attempt in December 1980 to unload 40,000 pounds of marijuana from a mother ship located 300-500 miles off the coast of Georgia (4 Tr. 237). At a taped meeting, petitioner discussed the off-loading with undercover agents who had agreed to provide an off-load site and crew in the Brunswick, Georgia area (4 Tr. 304-305; GX 1A at 3-4). For their services, petitioner agreed to pay the agents $25 per pound or $1 million (GX 1B at 3).

A Coast Guard cutter was dispatched to look for the mother ship (6 Tr. 93-94). Using information provided by petitioner regarding the location of the vessel, the cutter intercepted a shrimp boat heading toward the drop-off point (6 Tr. 97, 99). After the cutter fired 18 rounds across the shrimp boat's bow, it stopped and permitted the Coast Guard to come aboard. 43,280 pounds of marijuana were discovered on board (6 Tr. 107, 284).

The second importation attempt occurred in January 1981. Petitioner's co-conspirators met with agents to discuss the off-loading of 60,000 to 80,000 pounds of marijuana scheduled to arrive off the coast of Georgia (7 Tr. 187, 189, 191). At one of the meetings, petitioner told the agents that he wanted the marijuana trucked out of Brunswick, Georgia, in refrigerated tractor-trailers packed with some seafood and that he wanted the driver to carry a falsified bill of lading as camouflage (7 Tr. 258). At this meeting, petitioner provided $15,000 of a promised $25,000 in front money, explaining that he had lost money on the December load (7 Tr. 259). After petitioner moved the pick-up point to a less secure place, the agents, at co-defendant Sam Ward's instigation, met with petitioner and demanded that $500,000 be paid before their off-loading vessel would go to the new location. After consulting with a co-conspirator, petitioner

made a counter-proposal, which Ward rejected, and eventually the operation was abandoned (7 Tr. 196-197).

The final operation involved arrangements for the agents to transport 5,000 pounds of marijuana by truck from a South Carolina stashhouse to New York (8 Tr. 139-140, 250). In a bus station meeting, petitioner paid one of the agents $1,900 in front money (8 Tr. 155-156). After a call to confirm plans, the agents met petitioner to receive final instructions (8 Tr. 164, 165). Pursuant to those instructions, two officers were dispatched to pick up the marijuana (8 Tr. 166, 169). At petitioner's request, the officers were provided with a seal and a bill of lading so that they would appear to be making a regular commercial run (8 Tr. 168). Pursuant to arrangements with local law enforcement officials, the officers' truck was stopped and the marijuana was seized, but the federal agents were allowed to "escape" (8 Tr. 169).

2. The court of appeals affirmed all of petitioners' convictions except for the Section 846 conspiracy conviction, which it vacated as a lesser-included offense of the Section 848 continuing criminal enterprise (Pet. App. 18a-19a). The court of appeals held, inter alia, that there was sufficient evidence that petitioner obtained substantial income or resources from engaging in a continuing criminal enterprise (Pet. App. 15a-18a). The court concluded that "resources" within the meaning of the statute includes marijuana acquired as part of the enterprise (Pet. App. 16a). The court reasoned that construing the term "resources" broadly was consistent with Congress's intent to punish professional criminals severely when they engage in continuing criminal drug violations (Pet. App. 17a). Because there was evidence that petitioner had constructively obtained marijuana during the third operation, the court held that the evidence was sufficient to support petitioner's conviction under 21 U.S.C. 848 (Pet. App. 17a-18a).

ARGUMENT

Petitioner contends (Pet. 4-13) that the court of appeals erred in construing the "substantial income or resources" requirement in 21 U.S.C. 848 to embrace receipt of marijuana. The court's interpretation of Section 848 is, however, a reasonable one that conflicts with no decision of this Court or any other court of appeals; further review is therefore not warranted.

As the court of appeals observed (Pet. App. 16a), Section 848 "does not explicitly define the term 'resources.' " Nor does the legislative history provide any direct evidence of what Congress meant by the term "resources"; it is nowhere defined in the reports or debates on the proposed legislation.[2] But if Congress had intended to gauge the size of an operation by consideration only of its monetary proceeds, it seems clear that it would not have included the word "resources" in the statute. By referring to "resources," Congress foreclosed the kind of argument petitioner urges, which makes prosecution of the supervisor of a criminal

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[2]Petitioner emphasizes (Pet. 6) the omission of the word "resources" in two references in the House Report. See H.R. Rep. 91-1444 (Pt. 1), 91st Cong., 2d Sess. 5, 10 (1970). Petitioner suggests that "resources" was thus merely another term for "income." This construction is, however, clearly incorrect. In both instances cited by petitioner, the House Report was not purporting to define the phrase "income or resources," but was merely summarizing the criminal penalties under the Act and used the phrases "substantial income" and "substantial profits" to describe the circumstances in which the heavy penalties of 21 U.S.C. 848 would apply. Thus, it is plainly inappropriate to attach any significance to the omission of the word "resources" in these statements. Indeed, the fallacy of petitioner's argument is illustrated by the second of these two references, in which the Report uses the term "profits" instead of either of the statutory terms "income" or "resources."

enterprise depend upon the conversion of a valuable commodity into cash.[3]

Congress enacted 21 U.S.C. 848 to provide "severe criminal penalties for persons engaged in illicit manufacture or sale of controlled drugs primarily for the profits to be derived therefrom." H.R. Rep. 91-1444 (Pt. 1), 91st Cong., 2d Sess. 10 (1970). In other words, Congress was attempting to proscribe, and punish harshly, the activities of large-scale drug dealers. Whether their gains were monetary or in the form of drugs was immaterial so long as the gains were substantial. See *United States* v. *Chagra*, 669 F.2d 241, 257 (5th Cir. 1982); *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), rev'd on other grounds, 432 U.S. 137 (1977). The court of appeals' construction of the "substantial income or resources" requirement is faithful to this legislative intent.[4]

Nor are the cases petitioner relies upon (Pet. 10-11) contrary to the decision below. He asserts that all prior decisions focus on the financial benefit gained by the defendant and that those cases that focus on the quantity of drugs involved with the enterprise do so only to calculate the financial gain. But it is not primarily the form of the benefit—financial or otherwise—that concerned those

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[3]Petitioner is mistaken that the court of appeals' construction effectively omits the substantial income or resources requirement from the Act. It does not follow ineluctably from the fact that an individual engages in three drug violations in concert with five or more other persons whom he supervises that he obtains substantial income or resources. Even if what he gains in each case is drugs rather than cash, it is not inevitable that the gain is substantial. And, as explained in text, it is the substantiality element that was Congress's principal concern.

[4]There is no merit to petitioner's assertion (Pet. 13) that his conviction was affirmed on a basis different from that presented to the jury in the district court's instructions. The court instructed the jury that resources "means any property that can be converted into supplies or means of raising money for supplies" (6 Tr. 136). Marijuana obviously satisfies this definition.

courts, but rather the substantiality of the income or resources of the enterprise. See, *e.g.*, *United States* v. *Losada*, 674 F.2d 167, 173 (2d Cir. 1982) ("the $2000 figure * * * is not so insignificant as to render the statute inapplicable"); *United States* v. *Chagra*, 669 F.2d at 257 ("appellant obtained several kilograms of cocaine and a large quantity of marijuana * * * which would have brought appellant a handsome return"). Thus, the issue in those cases was very different from that in this case.

Moreover, even without the marijuana, the evidence regarding petitioner's receipt of income or resources was comparable to that found to be substantial in the cases cited by petitioner. Here large quantities of marijuana passed through petitioner's operation and thousands of dollars changed hands during the operation. Compare *United States* v. *Webster*, 639 F.2d 174, 182 (4th Cir. 1981); *United States* v. *Bolts*, 558 F.2d 316, 319 (5th Cir.), cert. denied, 434 U.S. 930 (1977). As the district court held, "[t]he evidence adduced in this case established beyond a reasonable doubt that [petitioner] orchestrated the importation of multi-tonnage quantities of marijuana, that significant amounts of contraband and money changed hands, and that he anticipated a handsome profit from the eventual sale of the contraband" (3 Tr. 709). Compare *United States* v. *Sisca*, 503 F.2d 1337, 1346 (2d Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

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